No. 91-6516

In The

Supreme Court of the United States

October Term, 1991

EDWARD SOLDAL, et al.,

Petitioners,

vs.

COOK COUNTY, ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Was the seizure and removal of petitioners' house and its contents governed by the Fourth Amendment's prohibition of unreasonable seizures where the seizure did not occur in the course of a criminal investigation?

2. Did the seizure, removal, and virtual destruction of petitioners' house and its contents violate the Fourteenth Amendment's guarantee of substantive due process?

LIST OF PARTIES

The parties to the proceeding in the court below were Edward Soldal, Mary Soldal, Jimmy Soldal, Alena Soldal, Joseph Soldal, and Jessie Soldal; Cook County deputy sheriffs Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Haritos, Officer Hunt, Officer Vaid, Officer Doe and Officer Poe; Terrace Properties Inc., Jeffrey Peterson, Margaret Hale, Margaret Celeski and Kimberly Giovanni.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

PROCEEDINGS BELOW 12

SUMMARY OF ARGUMENT 14

ARGUMENT 15

I. THE SEIZURE OF PETITIONERS' HOUSE AND ITS CONTENTS BY DEPUTY SHERIFFS WAS GOVERNED BY THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEIZURES 15

A. The Fourth Amendment Applies to All Seizures Whether or Not They Occur in the Context of a Criminal Investigation 15

B. The Fourth Amendment Protects Possessory Rights 25

C. The Seizure of Petitioners' House, Papers and Effects Violated their Fourth Amendment Privacy Rights 33

D. Petitioners' Fourth Amendment Claim Need Not Have Been Brought as a Procedural Due Process Claim 38

E. Petitioners were Protected by the Fourth Amendment 46

TABLE OF CONTENTS – Continued

Page

II. THE SEIZURE, REMOVAL AND VIRTUAL DESTRUCTION OF PETITIONERS' HOUSE VIOLATED THEIR FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS..... 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Abel v. United States, 362 U.S. 217 (1960) 16

Adickes v. Kress and Co., 398 U.S. 144 (1970) 4

Alderman v. United States, 394 U.S. 165 (1968)..... 27

American Tobacco Co. v. Werkmeister, 207 U.S. 284 (1907) 17

Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986) 37

Arizona v. Hicks, 480 U.S. 321 (1986) 23, 26, 28, 30

Autoworld Specialty Cars v. United States, 815 F.2d 385 (6th Cir. 1987)..... 31

Beck v. Ohio, 379 U.S. 89 (1964) 42

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 47

Boyd v. United States, 116 U.S. 616 (1885).....16, 17

Brower v. County of Inyo, 489 U.S. 593 (1989) 25

California v. Carney, 471 U.S. 386 (1984) 46

California v. Greenwood, 486 U.S. 35 (1987)..... 23

Camara v. Municipal Court, 387 U.S. 523 (1966).. 20, 21, 22

Carey v. Piphus, 435 U.S. 247 (1978) 43

Chapman v. United States, 365 U.S. 610 (1961)..... 46

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)..... 21

Coolidge v. New Hampshire, 403 U.S. 443 (1971)....28, 29

Daniels v. Williams, 474 U.S. 327 (1985)..... 49

Delaware v. Prouse, 440 U.S. 648 (1979) 21

TABLE OF AUTHORITIES – Continued

Page

District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), aff'd on other grounds 339 U.S. 1 (1950) 18

Donovan v. Dewey, 452 U.S. 594 (1981) 21

Entick v. Carrington, 19 State Trials 1 (1765) 16

FW/PBS Inc. v. Dallas, 493 U.S. 215 (1990) 39

Fong Yue Ting v. United States, 149 U.S. 698 (1892) 17

Frank v. Maryland, 359 U.S. 360 (1958) 19, 20

Fuentes v. Shevin, 407 U.S. 67 (1972) 32, 40, 44

Go-Bart Co. v. United States, 282 U.S. 344 (1930) 18

Goldberg v. Kelley, 397 U.S. 254 (1970) 44

Goss v. Lopez, 491 U.S. 565 (1975) 44

Graham v. Connor, 490 U.S. 386 (1989) 39, 40

Griffin v. Wisconsin, 483 U.S. 868 (1987) 21

Griswold v. Connecticut, 381 U.S. 497 (1965) 27

Hester v. United States, 265 U.S. 57 (1924) 23

Horton v. California, 496 U.S. 128 (1990) .. 26, 28, 29, 30

Hudson v. Palmer, 468 U.S. 518 (1984) 22, 38, 40, 44

Huckle v. Money, 2 Wils. K. B. 206, 95 Eng. Rep. 763 (1763) 15

Illinois v. Andreas, 463 U.S. 675 (1983) 28

Ingraham v. Wright, 430 U.S. 651 (1977) 40

Katz v. United States, 389 U.S. 347 (1967) 27, 42

Malley v. Briggs, 475 U.S. 335 (1985) 44

TABLE OF AUTHORITIES – Continued

Page

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 21

Maryland v. Macon, 472 U.S. 463 (1984) 26, 28

Memphis Light Gas and Water Division v. Craft, 436 U.S. 1 (1978) 44

Michigan v. Tyler, 436 U.S. 499 (1978) 21

Minnesota v. Olsen, 495 U.S. 91 (1990) 46

Money v. Leach, 3 Burr. 1742, 97 Eng. Rep. 1050 (1765) 15

Monroe v. Pape, 365 U.S. 167 (1961) 38

Moore v. Marketplace, 754 F.2d 1336 (7th Cir. 1985) 45

Murray's Lessee et al. v. Hoboken Land and Improvement Co., 18 How. 272 (1855) 17, 49

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 21

New Jersey v. T.L.O., 469 U.S. 325 (1985) 22

New York v. Burger, 482 U.S. 691 (1987) 21

O'Connor v. Ortega, 480 U.S. 709 (1987) 21, 22, 37

Oliver v. United States, 466 U.S. 170 (1984) 23

Olmstead v. United States, 277 U.S. 438 (1928) 19, 36

Palko v. Connecticut, 302 U.S. 319 (1947) 49

Parratt v. Taylor, 451 U.S. 527 (1981) 40, 44

Rakas v. Illinois, 439 U.S. 128 (1978) 30, 47

Rochin v. California, 342 U.S. 165 (1951) 49

TABLE OF AUTHORITIES – Continued

Page

Skinner v. Railway Labor Executive's Association, 439 U.S. 602 (1989) 21

Snyder v. Massachusetts, 291 U.S. 97 (1933) 49

Texas v. Brown, 460 U.S. 730 (1982) 26, 28, 30

United States v. Allen, 644 F.2d 749 (9th Cir. 1980) 31

United States v. Bagley, 772 F.2d 482 (9th Cir. 1985) 31

United States v. Biswell, 406 U.S. 311 (1972) 21

United States v. Cagle, 849 F.2d 924 (5th Cir. 1988) 31

United States v. Jacobsen, 466 U.S. 109 (1984) 24, 26, 28, 29

United States v. Place, 462 U.S. 696 (1982) ..... *passim*

United States v. Roberts, 644 F.2d 683 (8th Cir. 1980) 31

United States v. Salvucci, 448 U.S. 83 (1979) 30, 31

United States v. Sperry Corp., 493 U.S. 52 (1990) 40

Weeks v. United States, 232 U.S. 382 (1914) 18

Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (1766) 15

Wolff v. McDonnell, 418 U.S. 539 (1974) 44

Wyman v. James, 400 U.S. 309 (1970) 21

Yee v. City of Escondido, ___ U.S. ___, 60 U.S.L.W. 4301 (April 1, 1992) 46

Zinermon v. Burch, 494 U.S. 113 (1989) 38, 39, 43, 44, 49

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the United States Constitution ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Fourteenth Amendment to the United States Constitution ..... *passim*

STATUTES

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 ..... 2, 4, 12, 46

Ill. Rev. Stat. Ch. 80 §201 3

Ill. Rev. Stat. Ch. 80 §208 .....3, 5

Ill. Rev. Stat. Ch. 110 §9-101 et seq 2, 5

BOOKS

N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 16

R. Posner, The Economics of Justice III (1981) 16, 35

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LAW REVIEW ARTICLES

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) 16

Barrett, The Fourth Amendment, 1960 Sup. Ct. Rev. 46 16

Foote, Remedies for Police Violations, 39 Minn. L. Rev. 493 (1955) 39

Frankael, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1920-21) 16

TABLE OF AUTHORITIES – Continued

Page

Fritzler, Optimality in Fourth Amendment Law, Am. Cr. L. Rev. 27:473 (1990) 32, 36, 37

Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49 ..... 16, 32, 35

Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173 ..... 32, 36

Schulhoffer, On the Fourth Amendment Rights of the Law Abiding Public, 1989 Sup. Ct. Rev. 87 21

3 Vand. L. Rev. 820, 822 (1950) 19

63 Harv. L. Rev. 349, 350 (1949) 19

OTHER AUTHORITIES

Quincey's Mass. Rep. 471 (1865) 16

Black's Law Dictionary, 4th Edition (1951) 25

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 52-89) is reported at 942 F.2d 1073. The panel opinion of the court of appeals (J.A. 28-51) is reported at 923 F.2d 1241. The opinion of the United States District Court for the Northern District of Illinois (J.A. 3-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1991. The Petition for a Writ of Certiorari was filed on November 23, 1991 and was granted on March 9, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a) The Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

b) Section 1 of the Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

c) 42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

d) Ill. Rev. Stat. Ch. 110 §9-101, 9-102(a)1-4, 9-103.

§9-101. Forcible entry prohibited. No person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he or she shall not enter with force, but in a peaceable manner.

§9-102. (a) When action may be maintained. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

1. When a forcible entry is made thereon.

2. When a peaceable entry is made and the possession unlawfully withheld.

3. When entry is made into vacant or unoccupied lands or tenements without right or title.

4. When any lessee of the lands or tenements, or any person holding under such lessee, holds possession without right after the termination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise . . .

§9-103. Mobile home site. The rental of land upon which a mobile home is placed or the rental of a mobile home and the land on which it is placed, for more than 30 days, shall be construed as a lease of real property.

e) Ill. Rev. Stat. Ch. 80 §201, 208.

§201. Applicability. This Act shall regulate and determine legal rights, remedies and obligations of the parties to any lease of a mobile home or mobile home lot in a mobile home park containing five or more mobile homes within this State. Any lease, written or oral, shall be unenforceable insofar as any provision thereof conflicts with any provision of this Act.

§208. Renewal of Lease. Every lease of a mobile home or lot in a mobile home park shall contain an option which automatically renews the lease; unless: (a) the tenant shall notify the owners 30 days prior to the expiration of the lease that he does not intend to renew the lease; or (b) the park owner shall notify the tenant 30 days prior to the expiration of the lease that the lease will not be renewed and specify in writing the reasons, such as violations of park rules, health and safety code or irregular or non-payment of rent.

STATEMENT OF THE CASE

This is an action brought pursuant to 42 U.S.C. §1983 by petitioners Edward and Mary Soldal and their children Jimmy, Alena, Joseph and Jessie. Count 1 of the complaint alleged that respondents Cook County deputy sheriffs and private parties violated petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution by unreasonably seizing and removing their trailer home from a mobile home park and damaging their property. R.1, par. 33.[1]

In March, 1985, petitioners Edward and Mary Soldal moved to Willoway Terrace mobile home park in Elk Grove Village, Illinois, where they rented a lot for their trailer home and lived with their children, petitioners Jimmy, Alena and, after their birth in 1986, Joseph and Jessie.[2] Respondent Terrace Properties Inc., often known as Willoway, was the owner of Willoway Terrace, and respondent Margaret Hale was the manager of the park. Under Illinois law, the Soldals, as tenants of a mobile home park, had the right to continue to rent their lot and

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[1] References denoted "R.___" are to the docket entries in the District Court. The complaint also brought claims under state law, and federal civil rights claims based on subsequent arrests of Edward Soldal. Certiorari was sought, and granted, only on whether the facts underlying Count 1 of the Complaint constituted a violation of petitioners' constitutional rights under the Fourth and Fourteenth Amendments.

[2] Since this case is on appeal from the grant of summary judgment for respondents, the facts are taken from the affidavits and papers before the district court with all factual inferences construed against respondents and in favor of petitioners. *See Adickes v. Kress and Co.*, 398 U.S. 144, 158-59 (1970).

renew their lease unless the park owner obtained a judicial order evicting them. Ill. Rev. Stat. Ch. 110 §9-101 *et seq.* Such an order could be obtained only if the park owner proved specific grounds for nonrenewal or termination of the lease "such as violation of park rules, health and safety code or irregular or non-payment of rent." Ill. Rev. Stat. Ch. 80 §208.

In May, 1987, Terrace Properties filed an eviction proceeding against petitioners in the Circuit Court of Cook County. This suit was dismissed on June 2, 1987. In August, 1987, Terrace Properties and Hale filed another eviction proceeding against petitioners, seeking possession of their lot but claiming no unpaid rent. The case was set for trial on September 22, 1987. R.56, Attachment B.

Then, in early September, 1987, Terrace Properties and Hale decided that they were going to evict the Soldals immediately, in violation of Illinois law and the Soldals' right to continued possession of their lot, by towing their trailer home out of the park. On September 4, they informed the Cook County Sheriff's Department that they were about to physically evict the Soldals, and requested the presence of Cook County sheriff deputies because they expected that the Soldals might try to resist. R.56, Statement of Facts ¶ 7; R.56, Attachment C. The Cook County Sheriff's Department agreed to send deputy sheriffs to the mobile home park to ensure that the removal of the mobile home was accomplished without any incidents. R.56, Statement of Facts ¶ 9; R.56, Attachment C.

At about 1:00 p.m. on September 4, two employees of respondent Terrace Properties arrived at petitioners' home accompanied by Cook County deputy sheriff Shawn O'Neill.[3] O'Neill had been ordered to the scene by Cook County sheriff's captain Jackson pursuant to the request from Terrace Properties and Hale. R.56, Statement of Facts ¶ 10; R.56, Attachment C; R.56, Attachment E, p. 12-15. Deputy sheriff O'Neill parked his car in the street outside petitioners' home, while the Terrace Properties' employees began pounding on the trailer and "started to tear our place apart . . . Yanking the sewer box, the water box off the side of the trailer." R.56, Attachment E, p. 13-15 (deposition of Edward Soldal).

When Edward Soldal asked the employees "What are you doing?" one employee told Mr. Soldal "to ask the sheriff deputy" and continued "ripping our trailer apart." R.56, Attachment E, p. 16. Mr. Soldal turned around and found that deputy sheriff O'Neill had exited his car and was standing behind him. When Mr. Soldal asked him "What are you going to do about this?" O'Neill replied that "he was there to see that I didn't interfere with Willoway's workers." R.56, Attachment E, p. 17-18. Mr. Soldal then asked "Are you just going to stand there while they destroy our home?" and the deputy answered "I'm just doing what the chief told me." R.56, Attachment

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[3] The name of deputy sheriff O'Neill was discovered by petitioners pursuant to discovery materials received from Terrace Properties Inc. and Hale. At the time the case was dismissed as to all defendants, there was a pending Motion to Amend the complaint to add O'Neill as a defendant, in place of Officer Doe. R.46. The district court ruled that this motion was moot. R.67.

E, p. 17-18. At the time he made these statements deputy sheriff O'Neill knew that the eviction was unlawful. R.56, Attachment C. Mr. Soldal then took photographs of the Willoway employees taking the trailer apart while deputy O'Neill watched. R.56, Attachment E, p. 19. Next, Mr. Soldal attempted to telephone his lawyer, but as the phone rang the line went dead, because it was cut. He left his home and called from a pay phone. His lawyer contacted the Sheriff's Department and spoke to respondent Cook County sheriffs Chief Wittsman and Captain Levy who both claimed that the department was unaware that any deputy sheriffs were at the mobile home park. R.56, Attachment E, p. 24. In fact the Sheriff's Department did know this. R.56, Attachment C.

Mr. Soldal then received a phone call from either Wittsman or Levy, who again claimed that no deputy sheriffs were at the park. R.56, Attachment E, p. 24-25. Next, Mr. Soldal talked again to his lawyer who told him that Levy, Wittsman, and another deputy sheriff had said that they were going to put a stop to the eviction. R.56, Attachment E, p. 25-26.

But when Mr. Soldal returned to his home he found that the Terrace Properties' employees, in the presence of deputy sheriff O'Neill, "had torn (the mobile home) almost completely apart. And they had hooked a tractor to it and was trying to yank it out of its spot. They had torn all the skirting off; they had torn down the canopy." R.56, Attachment E, p. 26-28. Mr. Soldal left to call his lawyer again. She made more calls to the Sheriff's Department and advised Mr. Soldal to return to the trailer park and sign a complaint against Terrace Properties for criminal damage to property. R.56, Attachment E, p. 35-37.

When Mr. Soldal returned to his home he found two more deputy sheriffs in the area in addition to O'Neill.[4] R.56, Attachment E, p. 38. He said he wished to file a complaint and one of the deputies, probably respondent deputy sheriff Hunt, told him to see respondent deputy sheriff Lieutenant Jones who was at the Willoway office. R.56, Attachment E, p. 38-39, 84-86. Mr. Soldal went to the Willoway office and found Lieutenant Jones meeting with Hale and employees of Terrace Properties. Lieutenant Jones directed Mr. Soldal to wait outside while he remained inside the office with Hale and the employees for a further 20 to 30 minutes with the blinds on the office windows drawn shut. R.56, Attachment E, p. 40-42.

When Jones eventually emerged from the office, Mr. Soldal told him that he wished to sign a complaint against Willoway. Jones said he had to talk to a district attorney and went back into the Willoway office for an additional thirty minutes. R.56, Attachment E, p. 45. When he came out again, Jones refused to allow Mr. Soldal to sign a complaint and told him that "it was between the landlord and tenant; that they were going to go ahead and continue to move out the trailer." R.56, Attachment E, p. 46.

Mr. Soldal returned to his home and found it had suffered further serious damage and that there were now four deputy sheriffs at the scene. R.56, Attachment E, p. 51-54. Eventually the Willoway workers managed to pull loose petitioners' home and tow it onto the street. R.56,

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[4] Because of a discovery stay ordered by the district court and the failure of the deputy sheriffs to timely answer discovery, petitioners do not know the names of these officers.

Attachment E, p. 55-56. Mr. Soldal returned to the Willoway office where he saw Jones talking to Hale. When Jones saw Mr. Soldal he stopped talking to Hale and told him that "they were working on where they were going to put the trailer," and when Soldal said they needed the trailer for a place to sleep Jones said "they were going to set us up at the YMCA." R.56, Attachment E, p. 56-57. When an employee of Willoway stated that the trailer was to be left on the street, Jones told him he could not do that. R.56, Attachment E, p. 58.

Mr. Soldal returned to his home, where two deputy sheriffs were still present, then went back to the Willoway office where he saw Hale and Jones, who were again talking together. R.56, Attachment E., p. 67-68. Mr. Soldal asked Jones where his home was going to be and Jones stated "that they were going to move the trailer and work out some place to stay. He said, either the YMCA or a motel or something he said . . . He just said, you know, to get your children together and, you know, leave the park." R.56, Attachment E, p. 69-70. Hale then looked at Jones and said "I'm going to tell him this in front of you, that he's not allowed to come back in the park," and Jones said to Mr. Soldal, "Now, you heard what she said." R.56, Attachment E, p. 70-71. Jones then told Mr. Soldal that he would let him know where he would be staying, and later told him that deputy sheriff Hunt would escort the Soldals to a motel, and that his trailer would be locked up in a construction company yard. R.56, Attachment E, p. 71, 80, 91-93.

Deputy sheriff Hunt then instructed Mr. Soldal to follow him in his car, and drove 8 to 10 miles to a motel. Mr. and Mrs. Soldal and their twin babies stayed at the

motel that night, while their two older children stayed the night with friends at Willoway. R.56, Attachment E, p. 93, 101. That night, Mr. Soldal attempted to file a complaint with the Sheriff's Department that his trailer had been taken and locked up by Willoway. Respondent deputy sheriff Vaid stated "You're the guy that had the trailer pulled out of Willoway today," and refused to let Mr. Soldal file a complaint. R.56, Attachment E, p. 128-135.

The next morning, September 5, 1987, Mr. Soldal returned to Willoway to pick up his children. On his way into the park he saw Hale. R.56, Attachment E, p. 101. While Mr. Soldal was at his friends' house getting his children, deputy sheriff Haritos came to the door, said "You're not supposed to be here," arrested and handcuffed Mr. Soldal, and told Mr. Soldal's children that their father was going to jail and they were going to a foster home. R.56, Attachment E, p. 103-107. Shortly thereafter, deputy sheriff Hunt arrived in a squad car with Hale, and Haritos went to talk to them while Mr. Soldal and his children were placed in a squad car. R.56, Attachment E, p. 108-109.

Haritos then drove the squad car to the Willoway office and went into the office with Hunt and Hale, while Mr. Soldal, who was still handcuffed, was left in the squad car with his two children. R.56, Attachment E, p. 110-111. After about an hour, Hunt emerged from the office and said he was taking the children to the motel and Mr. Soldal to jail. R.56, Attachment E, p. 112. Mr. Soldal was then jailed for about four hours.

On September 9, 1987, Judge Sophia H. Hall of the Circuit Court of Cook County found that Terrace Properties Inc., "without following the requirements of the

forcible entry and detainer statute, and without any other authority, forcibly removed (Mr. Soldal's) trailer from (Terrace Properties Inc.'s) lot 24 on September 4, 1987, after disconnecting (Mr. Soldal's) utilities," and entered an order requiring Terrace Properties Inc. to return petitioners' home to its original location. R.56, Attachment D. Eventually, the home was returned, but in badly damaged condition. Mr. Soldal attempted to file a criminal complaint based on the extensive damage to the trailer but deputy sheriff Vaid refused to allow this. R.56, Attachment E, p. 136-137.

Throughout the entire incident on September 4, 1987, Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Hunt, Officer O'Neill and the unidentified deputy sheriffs knew that petitioners had the legal right to remain at Willoway and that there was no order authorizing their eviction. R.56, Attachment C; R.56, Attachment E, p. 25-26, 35-37.

The eviction proceedings which had originally been scheduled for trial on September 22, 1987, were tried on November 10, 1987. After evidence was presented, judgment on the merits was entered in favor of the Soldals and the trailer remained at the park. R.1, ¶ 24. However, because of the extensive damage to the trailer and the failure of Terrace Properties to repair it, the trailer was uninhabitable during the winter and petitioners were forced to vacate their home and move it out of the park in December, 1987. R.1, ¶ 25-27.

All criminal charges against Mr. Soldal were dismissed on February 23, 1988 when Mr. Soldal demanded

trial and the prosecutor elected not to pursue the charges. R.1, ¶ 28.

PROCEEDINGS BELOW

In the district court, respondent deputy sheriffs and two individual defendants moved for summary judgment on the grounds, *inter alia*, that the private parties, not the deputy sheriffs, had seized and removed petitioners' home, and that the facts did not support a finding of conspiracy or joint action between the private parties and the deputy sheriffs. Therefore, these defendants argued, the home was not seized under color of state law under 42 U.S.C. §1983. R.38. The district court accepted this argument, granted the motion, and entered judgment in favor of all defendants on all counts. R.67, Appendix C.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit, arguing that the facts did show sufficient joint action to sustain the §1983 claim. The majority opinion, written by Judge Posner, accepted petitioners' argument on this issue, but held that this aspect of petitioners' complaint should nevertheless be dismissed because the seizure of petitioners' home did not violate any of their constitutional rights. J.A. 41-42.[5] In dissent, Judge Flaum argued that the facts showed violations of both petitioners' Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right to substantive due process. J.A. 45-51.

[5] The court reversed and remanded on other aspects of plaintiff Edward Soldal's claims which are not at issue here.

Petitioners sought rehearing and the court of appeals vacated the panel opinion and granted rehearing *en banc*. 931 F.2d 445 (7th Cir. 1991). The case was reargued and, by a 6-5 vote, the court, in an opinion again written by Judge Posner, reaffirmed the panel decision, elaborated on its holding that there was no Fourth Amendment violation, and reinstated the panel opinion in all other respects. J.A. 52-68. The majority acknowledged that petitioners' house had been seized, but held that this seizure did not implicate the Fourth Amendment. The majority held that no privacy interests of petitioners had been violated because neither their home nor property had been searched and because they were not suspected of criminal wrongdoing. The opinion conceded that petitioners' possessory interests in their house and effects had been violated, but held that the Fourth Amendment does not protect such interests, which can be vindicated, if at all, only through a Fourteenth Amendment procedural due process claim. The court further noted that petitioners had not brought such a claim, but that, if they had, it would have failed because state law potentially provided some relief for the deprivation they had suffered.

Judge Flaum's dissent, joined by four other members of the court, asserted that the Fourth Amendment does protect possessory interests, that it should make no difference that petitioners were not suspected of a crime, and that the Soldals' privacy interests protected by the Fourth Amendment were violated when the sheriffs eliminated that privacy by removing their home. J.A. 71-89. The dissent also argued that petitioners had set forth a

valid Fourteenth Amendment substantive due process claim. J.A. 87.

SUMMARY OF ARGUMENT

The Fourth Amendment's prohibition of unreasonable seizures applies whether or not the seizure occurs in the course of an investigation into possible violations of criminal laws, and a seizure may be unreasonable under the Fourth Amendment if it affects either possessory or privacy rights. The Seventh Circuit's holding that the Fourth Amendment was inapplicable in this case, no matter how unreasonable the seizure, because the Soldals were not suspected of a crime, and on the ground that no Fourth Amendment interests were implicated by the seizure, is contrary to the language and history of the Fourth Amendment and prior decisions of this Court. The seizure of petitioners' home and its contents violated both their privacy rights to pursue their everyday lives, and their possessory rights in their home. Each of these rights is protected by the Fourth Amendment and, therefore, the seizure must be evaluated under the Fourth Amendment's reasonableness standard.

Petitioners' claim was not a procedural due process claim and did not have to be brought as such. The claim was for unreasonable seizure of petitioners' home, not for violation of procedure. Even if petitioners did have a procedural due process claim, this did not bar them from also pursuing a claim directly under the Fourth Amendment. Because petitioners were not bringing a procedural due process claim the existence of potential state law

remedies was irrelevant; such remedies did not affect petitioners' right to proceed based on a claim under a specific clause of the Bill of Rights or a violation of Fourteenth Amendment substantive due process. Finally, the fact that petitioners were tenants whose entitlement to possession of their home rested in part on rights arising under state law did not diminish their protection under the Fourth Amendment.

In addition to their Fourth Amendment claim, petitioners also asserted a viable claim for violation of their substantive due process rights under the Fourteenth Amendment. The seizure and extensive damaging of petitioners' property violated their rights under the Fourteenth Amendment to be protected from intentional deprivations of property without due process.

ARGUMENT

I. THE SEIZURE OF PETITIONERS' HOUSE AND ITS CONTENTS BY DEPUTY SHERIFFS WAS GOVERNED BY THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEIZURES.

A. The Fourth Amendment Applies to All Seizures Whether Or Not They Occur in the Context of a Criminal Investigation.

The Fourth Amendment was drafted and enacted against the immediate backdrop of English struggles to defeat the government's untrammeled right to search and seize evidence and people to suppress political dissent, *Huckle v. Money*, 2 Wils. K. B. 206, 95 Eng. Rep. 763 (1763); *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1766); *Money v.*

Leach, 3 Burr. 1742, 97 Eng. Rep. 1050 (1765); *Entick v. Carrington*, 19 State Trials 1 (1765), and North American opposition to general writs of assistance to colonial authorities to search for and seize goods upon which duties had not been paid. *Boyd v. United States*, 116 U.S. 616, 624-630 (1885); N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 51-78 (1937) (hereafter "Lasson"); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 398 (1974); Frankael, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 361-68 (1920-21).[6]

The Amendment was not primarily directed towards protecting the rights of accused felons, *see e.g.*, Quincey's Mass. Rep. 471 (1865); T. Taylor, *Two Studies in Constitutional Interpretation*, 39 (1969), but rather to "protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions." Barrett, *The Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 71; *Abel v. United States*, 362 U.S. 217, 254 (1960) (Brennan J. dissenting). "(T)he English cases that inspired the Fourth Amendment were not criminal cases in which a defendant was seeking to escape conviction; they were tort cases in which the victims of unreasonable searches were seeking damages for invasion of their lawful interests." Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 52. Thus, it is clear that at the time of its passage the Fourth Amendment was seen principally as regulating governmental

[6] The more distant antecedents of the Fourth Amendment include protection of the home and property in Biblical, Roman and early English law. Lasson, p. 13-19.

activities that did not involve criminal law enforcement. Abuses in routine criminal law enforcement were not an impetus towards its enactment. The Fourth Amendment was seen as a check on the power of government agents to arbitrarily seize goods in non-criminal law enforcement activities such as tax collection.

Although there have been occasional decisions of this Court suggesting that the Fourth Amendment does not apply except in criminal cases or investigations, the majority of decisions, and all the more recent ones, reject any distinction based upon the motivation for the search or seizure. For example, in the landmark case of *Boyd v. United States*, 116 U.S. 616 (1885), the Court held that the Fourth Amendment was applicable in a non-criminal forfeiture case and that statutes compelling production of documents upon pain of forfeiture were unconstitutional under the Fourth and Fifth Amendments. The Court specifically noted that "the entry upon premises, made by a sheriff . . . for the purpose of seizing goods and chattels *by virtue of a judicial writ*," 116 U.S. at 624 (emphasis added), was not a Fourth Amendment violation, stressing the importance of a judicial writ and never suggesting that the Fourth Amendment did not apply to civil repossessions by law enforcement officers. However, dicta in *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 18 How. 272, 285 (1855), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1892), suggested that the Fourth Amendment might have no relevance in civil proceedings or outside a criminal prosecution. But in *American Tobacco Co. v. Werkmeister*, 207 U.S. 284 (1907), where the Court refused to consider a claim that seizure of a painting by a United States Marshal acting pursuant to a

writ of replevin obtained by a private party was a Fourth Amendment violation, the only ground for the decision was that the plaintiff had waived the issue by failing to raise it at trial, with no suggestion that the Fourth Amendment was inapplicable in a civil context. *Id.* at 301.

Then, in *Weeks v. United States*, 232 U.S. 383 (1914), the Court explicitly held that the protection of the Fourth Amendment "reaches all alike, whether accused of crime or not," 232 U.S. at 392, and in *Go-Bart Co. v. United States*, 282 U.S. 344 (1930), where no criminal case against the plaintiff was pending or contemplated, the Court held that the Fourth Amendment "protects all, those suspected or known to be offenders as well as the innocent . . . " 282 U.S. at 357.

With the growth of administrative regulatory power, the amount of governmental activity in non-criminal law enforcement increased and the question of the scope of Fourth Amendment arose more frequently. Before this Court dealt directly with the issue, the D.C. Circuit concluded that the Fourth Amendment applied to noncriminal administrative inspections. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). There, the court described the proposition that the Fourth Amendment was designed to protect only criminals as "preposterous. . . . To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection is a fantastic absurdity." *Id.* at 16-17. This opinion was generally praised by commentators, one of whom noted that:

> the right to be left alone is probably the fundamental principle involved in the Fourth Amendment, see Brandeis, J., dissenting in *Olmstead v. United States*, 277 U.S. 438 at 478 (1928), and thus it matters little whether a policeman or a health inspector intrudes. Historically it was probably the abuses of the general warrant which led to the adoption of the Fourth Amendment, but the individualistic spirit of that age would have rebelled equally at non-criminal invasions of the home unknown in 1789 when government was simpler.

63 Harv. L. Rev. 349, 350 (1949); *see also* 3 Vand. L. Rev. 820, 822 (1950) (applauding *Little* decision and describing restriction of the Fourth Amendment to criminal law enforcement as "strange").

But in *Frank v. Maryland*, 359 U.S. 360 (1958), four justices of this Court held that the Fourth Amendment was not a defense to a conviction for failing to allow a warrantless health inspection, stating that such inspections "touch[ed] at most upon the periphery of the important interests safeguarded by the [Fourth and] Fourteenth Amendment's protection against official intrusion," and holding that a warrant was therefore not required. Justice Whittaker concurred in the judgment, holding that the Fourth Amendment did apply to the states but that the request to search was not unreasonable and was thus constitutional. *Id.* at 373-74. Four dissenting justices argued that the Fourth Amendment "protects the citizen against unreasonable searches and seizures by government, whatever may be the complaint," *id.* at 374, asserted that the Fourth Amendment had always previously been thought to protect privacy in the context of

civil litigation, *id.* at 375-76, and concluded that "the Fourth Amendment thus has a much wider frame of reference than mere criminal prosecutions." *Id.* at 377.

The *Frank* holding lasted eight years. Then, in *Camara v. Municipal Court*, 387 U.S. 523 (1966), this Court re-examined whether administrative inspection programs were governed by the Fourth Amendment and overruled *Frank*. The Court held that "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," *id.* at 530, and noted that "even the most law abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority." *Id.* at 530-531. *Camara* held that "administrative searches . . . are significant intrusions upon the interests protected by the Fourth Amendment," *id.* at 534, which generally required a warrant, but that a warrant could be justified based upon a reasonable area inspection and did not require an individualized showing of probable cause to inspect.

Thus, the teaching of *Camara* is that the Fourth Amendment applies to any search or seizure and that the ultimate standard is that expressed in the amendment itself – reasonableness. Whether a search or seizure is reasonable is determined by balancing the governmental interest in the search or seizure against the extent of the invasion. *Id.* at 536-539. *Camara* involved searches, not seizures, but the Court nowhere indicated there should be any distinction between the two in terms of the applicability of the Fourth Amendment. *Camara* is also important, in light of the facts in this case, because it noted that

the appellant's status as a tenant did not diminish his Fourth Amendment rights, and that the landlord's consent to the inspection did not authorize inspection of appellant's premises. *Id.* at 540.

Since *Camara* there have been numerous decisions of this Court discussing the constitutionality of searches and seizures that were not performed for criminal law enforcement. *See*, Schulhoffer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup Ct. Rev. 87. In every case the Court has held that the governmental activity must be judged against the Fourth Amendment's standard of reasonableness. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *Wyman v. James*, 400 U.S. 309 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Donovan v. Dewey*, 452 U.S. 594 (1981); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New York v. Burger*, 482 U.S. 691 (1987); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executive's Association*, 489 U.S. 602 (1989). In some of these cases the search or seizure was deemed reasonable under the Fourth Amendment, in some it was not. But each case was clear that the search or seizure must be evaluated under Fourth Amendment standards, and that the fact that the invasion was not motivated by a criminal investigation was irrelevant in determining that the Fourth Amendment applied. Indeed, the constant theme throughout these cases is the rejection of the "anomalous" position that "the individual and his private property are fully protected by the Fourth

Amendment only when the individual is suspected of criminal behavior." *O'Connor v. Ortega*, 408 U.S. 709, 715 (1987) and *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1984) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967)). Moreover, in none of this Court's prior cases has there been any suggestion that, while the criminal or non-criminal context in which the invasion occurred is irrelevant in determining the Fourth Amendment's applicability to "searches", it is somehow relevant to "seizures."

There are very few cases in which this Court has held that a search or seizure need not be measured against Fourth Amendment standards, *i.e.* that the Fourth Amendment just is not in the picture. One was the "law enforcement" search and seizure in *Hudson v. Palmer*, 468 U.S. 517 (1983). There, the Court noted its "caution in approaching claims that the Fourth Amendment is inapplicable in a given context," *id.* at 525, but held that "prisoners have no legitimate expectation of privacy and therefore the Fourth Amendment's prohibition of unreasonable searches does not apply in prison cells." *Id.* at 530. Significantly, the Court equated searches and seizures, holding that "the same reasons that lead us to conclude that the Fourth Amendment's proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to seizures." *Id.* at 528 n. 8; *see also, id.* at 538 (O'Connor, J., concurring) ("[A]rrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects"). *Hudson* thus holds that prisoners have no Fourth Amendment privacy or possessory rights; contrary to the Seventh Circuit's holding, *Hudson* has no

bearing on the applicability of the Fourth Amendment to non-law enforcement searches and seizures, and does not hold that the Fourth Amendment protects only privacy interests.

Other cases in which the Fourth Amendment is not applicable include those involving "open fields," where the Court has noted that the amendment protects "persons, houses, papers, and effects" and not real property *per se*, *see e.g.*, *Hester v. United States*, 265 U.S. 57 (1924); *Oliver v. United States*, 466 U.S. 170 (1984), or where a person has abandoned property. *See, California v. Greenwood*, 486 U.S. 35 (1987). Of course, there are numerous other cases in which a Fourth Amendment claim has been rejected, but in each of them the invasion was measured against the reasonableness or warrant requirement of the Fourth Amendment, and either the search or seizure was found to be constitutional or the desired remedy – typically exclusion of evidence – was deemed inappropriate.

Thus, the history of the enactment of the Fourth Amendment and the holdings of this court establish that any governmental search and seizure must be measured against Fourth Amendment reasonableness standards.

In addition to being good law this approach also makes good sense. A seizure is a seizure, whether it occurs in the context of a criminal investigation or not. *Cf. Arizona v. Hicks*, 480 U.S. 321, 325 (1986) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). A seizure affects a person's legitimate interests in security, secrecy and seclusion – the interests that the Fourth Amendment was designed to protect – in the same way whether the seizure is made for

purposes of criminal law enforcement, civil law enforcement, or not for law enforcement at all. The subjective motivation for the invasion is irrelevant in determining the applicability of the Amendment, although it may have some relevance in evaluating the governmental interest involved.

Making the applicability of the Fourth Amendment depend on the intent of the seizing officers can lead to absurd results, as the present case illustrates. If the sheriffs had contended that they seized, but did not search, petitioners' home because they suspected it had drugs inside, the seizure would, under the Seventh Circuit's reasoning, be actionable under the Fourth Amendment and the seizure would have had to be authorized by a warrant or otherwise be reasonable. *See, e.g., United States v. Place*, 462 U.S. 696 (1982). Since there was no such suspicion, and the Soldals were entirely law abiding, the Seventh Circuit would deny them the protection of the Fourth Amendment, although the Soldals' privacy and possessory interests were affected in precisely the same way as if they had been suspected criminals. The only interest that is affected differently under these two scenarios is the "right" to be criminal, a "right" which the Fourth Amendment manifestly does *not* protect. *U.S. v. Jacobsen*, 466 U.S. 109, 123 (1984). The reasoning of the Seventh Circuit majority thus stands the meaning of the Fourth Amendment on its head.

It is against this background of the universality of the Fourth Amendment, a background that was either ignored or rejected by the Seventh Circuit when it held that the law-abiding have fewer rights under the Fourth Amendment than the suspected criminal, J.A. 67, that the

seizure of the Soldals' home must be measured. When viewed in this way, it is clear that the fact that the Soldals were not suspected of any criminal wrongdoing was irrelevant to whether the seizure of their home was governed by the Fourth Amendment.

B. The Fourth Amendment Protects Possessory Rights.

The Seventh Circuit's holding that the Fourth Amendment does not protect possessory rights is contradicted by the language of the Fourth Amendment and this Court's prior holdings. It is well established that if a seizure violates a person's possessory rights in a type of property protected by the Fourth Amendment the seizure must be evaluated under the Fourth Amendment's standard of reasonableness.

The first clause of the Fourth Amendment – "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . " – appears by its language to protect possessory interests in the property described, i.e. houses, papers and effects. "Secure" means "not exposed to danger," "safe," *Blacks Law Dictionary* 1521 (4th ed. 1951), and connotes peaceful possession, while "seizure" means an "intentional acquisition of physical control," a "willful" "detention or taking." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). Thus, a seizure of "houses, papers and effects" simply means an intentional taking of that property, and the plain words of the Fourth Amendment forbid such a seizure if it violates a person's peaceful possession and is unreasonable.

This Court has always interpreted this clause in accordance with these uncomplicated words. The Court has seen it as protecting two different and distinct expectations: privacy interests, which can be violated by searches *and* seizures, *United States v. Place*, 462 U.S. 696 (1982), and possessory interests, which are violated by seizures. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Texas v. Brown*, 460 U.S. 730, 747 (1982) (Stevens J., concurring); *Maryland v. Macon*, 472 U.S. 463, 469 (1984); *Arizona v. Hicks*, 480 U.S. 321, 323 (1986); *Horton v. California*, 496 U.S. 128 (1990). Both of these interests are important and neither trumps the other. "Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, see *Texas v. Brown*, 460 U.S. at 747-748 (Stevens, J., concurring in judgment), neither the one nor the other is of inferior worth or necessarily requires only lesser protection." *Arizona v. Hicks*, 480 U.S. 321, 328.

The majority of this Court's Fourth Amendment cases have involved searches, or searches and seizures, and thus have stressed the privacy interests protected by the Fourth Amendment. But when faced with a seizure alone, this Court has always held that the violation of a right of ownership, without any implication of privacy rights, is subject to the Fourth Amendment's prohibition of unreasonable seizures. "In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing

the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1982).

Although *Katz v. United States*, 389 U.S. 347 (1967), stressed the importance of looking to reasonable expectations of privacy rather than simple possessory interests in evaluating the constitutionality of searches, the Court was clear that Fourth Amendment "protections go further [than protecting individual privacy], and often have nothing to do with privacy at all." 389 U.S. at 350. In support of this point the Court quoted the dissenting opinion of Justice Black in *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965), that "the average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth." 389 U.S. at 350 n. 4.

That *Katz* did not remove possessory interests from Fourth Amendment protection was pointed out the following year in *Alderman v. United States*, 394 U.S. 165 (1968). There, the Court held that a homeowner's Fourth Amendment rights were violated by unauthorized surveillance of conversations in his home, even though he himself was not a participant in the conversations. The opinion stressed that *Katz* had decided that the Fourth Amendment "protects a person's private conversations *as well as* his private premises," *id.* at 178 (emphasis added), and "was not intended to withdraw any of the protection which the Amendment extends to the home." *Id.* at 180. In *Alderman*, no privacy rights of the homeowner were implicated yet his possessory interests were adequate to establish a Fourth Amendment violation and entitle him to suppression of evidence of conversations of others.

The distinction between the different interests implicated by "searches" and "seizures" has been exhaustively discussed in several "plain view" cases. In *Texas v. Brown*, 460 U.S. 730 (1982), for example, then Justice Rehnquist noted that, although the seizure of an object in plain view involves no invasion of privacy since the police are already legitimately on the premises, either because of a warrant or some exception to the warrant clause, such a seizure "does implicate the Amendment's limitations upon seizures of personal property." *Id.* at 738 n. 4. And, in *Horton v. California*, 496 U.S. 128 (1990), the Court noted, in relation to Fourth Amendment protections, that:

> If an article is already in plain view, neither its observation nor its seizure would involve any invasions of privacy. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Illinois v. Andreas*, 463 U.S. 675, 771 (1983). A seizure of the article, however, would obviously invade the owner's possessory interest. *Maryland v. Macon*, 472 U.S. 463, 469 (1985); *United States v. Jacobsen*, 466 U.S. 109, 113.

496 U.S. at 133-34. Much of the discussion in *Horton* involved possessory interests alone, a discussion and issue that would have been superfluous if the Amendment did not protect such interests. In rejecting the holding of the plurality in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that there was an inadvertence requirement for a valid plain view seizure, *Horton* quoted from Justice White's dissent in *Coolidge* wherein he stressed that the extent of interference with *possessory* rights is the same whether or not the police expect to find the seized evidence. *Horton*, 496 U.S. at 139 (quoting *Coolidge*, 403 U.S. at 516 (Justice White dissenting)). The *Horton* opinion

pointed out that once the privacy concerns of a valid search have been satisfied, the *Coolidge* inadvertence requirement furthers no additional Fourth Amendment interest, 496 U.S. at 140, obviously referring to possessory rights.[7]

This is also the holding of seizure cases. In *United States v. Place*, 462 U.S. 696 (1982), the Court held unanimously that a warrantless ninety minute detention of the petitioner's luggage, based upon reasonable belief but not probable cause that the luggage contained narcotics, was unreasonable. The Court noted that this seizure intruded upon two different interests of the petitioner – his "possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708. In *United States v. Jacobsen*, 466 U.S. 109 (1983), the Court relied on the distinct interests protected by the prohibitions against "searches" and "seizures" in holding that the Fourth Amendment's prohibition against unreasonable seizures could be violated apart from any violation of privacy interests. *Id.* at 124-125. The Court defined a seizure of property as "some meaningful interference with an individual's possessory interests in that property," *id.* at 113, and evaluated the seizure of a minute amount of cocaine under a Fourth Amendment reasonableness standard, even after the Court had concluded that no privacy interests had been violated.

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[7] Just as *Horton* held that the inadvertence requirement of *Coolidge* furthered no Fourth Amendment interest, so too the Seventh Circuit's requirement that the seizure occur in the context of a criminal investigation bears no relation to, and in fact undermines, the purpose of the Fourth Amendment.

Rakas v. Illinois, 439 U.S. 128 (1978), is not to the contrary. There, armed robbery defendants attempted to suppress evidence – a sawed off rifle and shells – which was found by police in the locked glove compartment and under the seat of a car in which the defendants were passengers. This Court held that the search did not violate their Fourth Amendment rights because "they asserted neither a property *nor a possessory interest* in the automobile, nor an interest in the property seized," *id.* at 148 (emphasis added), and had no legitimate expectation of privacy in the areas searched. *Id.* at 149. *Rakas* dealt only with the search of the car, not the seizure of the rifle and shells, since the petitioners did not claim that they owned the seized items. *Id.* at 130-131.[8] Nevertheless, the Court noted that a person with no expectation of privacy in an area searched could validly contest a seizure "if their own property were seized during the search." *Id.* at 142 n.11.

In *United States v. Salvucci*, 448 U.S. 83 (1979), where defendants challenged a search pursuant to a warrant of one defendant's mother's home, in the course of which 12 stolen checks were seized, the Court held that "legal possession of a seized good . . . does not invariably

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[8] Presumably, however, even if petitioners in *Rakas* had claimed ownership that would not have invalidated the seizure, providing that the search did not violate their Fourth Amendment rights. In that case, the police would have observed evidence the "incriminating character" of which was "immediately apparent," *Horton v. California*, 496 U.S. at 136, so as to justify its seizure as reasonable, based on probable cause. *Arizona v. Hicks*, 480 U.S. 321; *Texas v. Brown*, 460 U.S. 730, 739.

represent the protected Fourth Amendment interest," but that "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated." *Id.* at 91. Because *Salvucci* was a search case, the Court was concerned with whether the defendants had a reasonable expectation of privacy in the area searched rather than whether they had possessory rights in the seized goods. Nevertheless, the Court's discussion of property rights shows their continued importance in evaluating Fourth Amendment violations.

It is also noteworthy that different courts of appeals have consistently held that violations of property interests must be evaluated against the Fourth Amendment reasonableness standard, even in the absence of any violation of privacy interests. *See, e.g., Autoworld Specialty Cars v. United States*, 815 F.2d 385, 389 (6th Cir. 1987) (seizure of cars from a public showroom infringing "purely possessory interests in the vehicles" was governed by the Fourth Amendment); *United States v. Bagley*, 772 F.2d 482, 490 (9th Cir. 1985) (towing of a lawfully parked car constituted a Fourth Amendment seizure); *United States v. Roberts*, 644 F.2d 683 (8th Cir. 1980) (seizure of marijuana from a rental storage unit was a Fourth Amendment violation where no privacy interest was involved); *United States v. Allen*, 644 F.2d 749 (9th Cir. 1980) (officer's seizure of a suitcase constituted a Fourth Amendment violation warranting suppression of the drugs found therein, notwithstanding that the subsequent search was conducted pursuant to a valid warrant); *United States v. Cagle*, 849 F.2d 924 (5th Cir. 1988) (ninety

minute detention of a suitcase at an airport was an unreasonable seizure under the Fourth Amendment).[9]

It is thus clear from the history, text, and interpretation of the Fourth Amendment that it protects property interests in the types of property denominated by the Fourth Amendment – houses, papers and effects – separately from, and in addition to, privacy interests. Once this is accepted, it cannot be questioned that the Amendment protects the property interests of petitioners here – plenary ownership rights in their trailer home and its contents. This case does not raise the question of what lesser possessory rights are protected by the Amendment. Such interests range from the absolute ownership here, through lawful possession without ownership, to long-standing and legal but unauthorized possession, and end at unauthorized illegal possession. Each of these possessory interests have a differing level of protection under the Fourth Amendment, possibly corresponding to whether the possessor had an expectation of continued possession that society was prepared to consider reasonable, or whether there was "any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). But *this*

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[9] Commentators share this conclusion. *See, e.g.*, Posner, *Rethinking the Fourth Amendment, supra*, at 50-51 (The Fourth Amendment appears to include "both (1) property interests of the sort traditionally protected by tort actions for conversion and for trespass to real and personal property; and (2) interests in bodily integrity, mental tranquility, and freedom of movement. . . . This seems to me the minimum content of the Fourth Amendment . . . "); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173; Fritzler, *Optimality in Fourth Amendment Law*, Am. Cr. L. Rev. 27:473, 488-89 (1990) (hereafter "Fritzler").

case, presenting the highest level of possessory rights that is possible, clearly qualifies for Fourth Amendment protection.

Since the Fourth Amendment protects possessory interests alone, the holding of the Seventh Circuit must be reversed and the case remanded for a trial at which a jury can determine the reasonableness under the Fourth Amendment of the seizure of petitioners' house, papers and effects.

C. The Seizure of Petitioners' House, Papers and Effects Violated their Fourth Amendment Privacy Rights.

The court of appeals held, as a matter of law, that the seizure of petitioners' house, papers and effects and the wholesale disruption of their lives did not violate their privacy rights protected by the Fourth Amendment. This decision is completely at odds with the type of privacy interests traditionally protected by the Fourth Amendment and also violates petitioners' right to have a jury determine this issue.

This Court has consistently held that the Fourth Amendment protects a person's privacy interest in his lawful activities. The clearest example is *United States v. Place*, 462 U.S. 696 (1982). There, officers suspected that Place's luggage contained narcotics and temporarily seized it to obtain a warrant and/or have the bag sniffed by a trained narcotics detection dog. Ninety minutes after the seizure, the dog reacted positively to one bag and the luggage was detained over the weekend until a search warrant could be obtained; the luggage was then opened

and cocaine was discovered. In determining that the seizure was unreasonable under the Fourth Amendment, the Court looked to "the manner in which the seizure was conducted," *id.* at 707, the effect of the seizure on Place's travel plans and the extent to which it effectively restrained his freedom of activity, *id.* at 708, the length of the property detention, and the diligence of the police in pursuing their investigation. *Id.* at 709-10. The Court rejected any automatic rule that property seizures are less intrusive than seizures of the person, noting that the facts presented in *Place* did not support such a finding. *Id.* at 708.

Place and the Seventh Circuit's opinion in *Soldal* are incompatible. In *Place*, this Court found that the seizure of effects for ninety minutes based on reasonable suspicion was unreasonable and violated the Fourth Amendment. The temporary detention undoubtedly inconvenienced Place and made it more difficult for him to reach his destination in a timely fashion, but that was the extent of the intrusion on his privacy interests. Here, petitioners' home was taken away for several days, and then was returned irreparably damaged. Petitioners' ability to pursue their everyday lawful activities, and to live and sleep in their home, was destroyed. All afternoon and evening on September 4, petitioners were forced to deal with the seizure and its aftermath; the next day, Mr. Soldal returned to the trailer park to pick up his children and was arrested. For several days after that, petitioners were deprived of their home, and when it was returned it was scarcely habitable. The effect of the seizure on their right "to be left alone" and to pursue their lawful activities without interference was substantial. Moreover, the

manner in which the seizure was conducted aggravated its unreasonableness. The sheriffs, and the private parties with whom they acted, were aware that there was no judicial order authorizing the dispossession and ignored the repeated protests from petitioners and their lawyer. The property was extensively damaged during the seizure and the trailer was rendered substantially uninhabitable. In addition, the length of the property detention was far greater than in *Place* and the sheriffs showed no diligence whatsoever in evenhandedly enforcing the law. Under every criterion listed in *Place*, this seizure was a gross violation of the Fourth Amendment.

Place can be distinguished from this case only if the criminal investigation context of the *Place* seizure is considered determinative. But as already demonstrated (*supra* at 15-25), the Fourth Amendment applies whether or not the seizure occurs in the course of a criminal investigation. If that factor is removed from consideration, it is obvious that the injury to the Soldals' privacy interests was far greater than the injury to the defendant in *Place*.

Moreover, the privacy violations suffered by petitioners here are precisely the type that commentators have identified as at the core of the Fourth Amendment. The right of privacy protected by the Fourth Amendment both includes, and is greater than, the right to secrecy. Judge Posner has previously noted that privacy "embrace[s] at least two distinct interests. One is the interest in being left alone. . . . The other privacy interest [is] concealment of information." Posner, *Rethinking the Fourth Amendment*, *supra*, at 51 n. 7; *see also*, R. Posner, *The*

Economics of Justice III, 272-73 (1981). The first interest can be described as the right of seclusion, the "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis J., dissenting), the second as the right to secrecy. There is a strong argument that both the historical background of the Fourth Amendment and contemporary social interests support giving greater protection to the right of seclusion than to the right of secrecy. While secrecy may assist fraud by concealing information that society has an interest in knowing, violation of seclusion is likely to disrupt socially useful activities. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, *supra*, at 174-76.

Professor Fritzler has described privacy costs from a Fourth Amendment violation as including "one's interest in privately pursuing lawful activities without interference, one's interest in not having property damaged or put into disarray by police intrusions and one's interest in being free from intrusions and observations that could cause embarrassment or loss of personal dignity." Fritzler, *supra*, at 477. Professor Fritzler argues that the privacy-related interest in the right to pursue lawful activities without interference is violated by any interference in a lawful activity, that the degree of intrusiveness of a search or seizure determines the degree to which the interest is harmed, and that, "in some settings, such as a home, there is a greater value attached to non-interference with one's activities." Fritzler, *supra*, at 504. Fritzler also notes the relationship between privacy and possessory interests:

> There are costs associated with destructive law enforcement behavior during a search or seizure. There is a privacy interest, perhaps more properly termed a property interest, in not having one's possessions taken away by police for any period of time. The degree to which this interest is interfered with depends upon the items which are taken and the length of time that their owner is deprived of their use.

Fritzler, *supra*, at 505.

There is thus no basis for the Seventh Circuit's conclusion that no privacy interests of petitioners were implicated here. Moreover, in reaching this conclusion and sustaining the grant of summary judgment, the Seventh Circuit made an unwarranted factual determination. Summary judgment is appropriate only if there is no genuine issue for trial; "if reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed," *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250-51 (1986), nor should summary judgment be entered. It was for a fact finder to determine whether petitioners' reasonable expectations of privacy had been violated, a determination that should be made only after a full trial, not on a paper record where respondents did not even contest the existence of a privacy interest.

Here, five members of the court of appeals were firmly of the opinion that the facts did demonstrate a violation of privacy interests. The majority's holding, as a matter of law, that they did not, usurped the function of the jury. In this context, summary judgment was inappropriate and the case should be remanded to the district court for a full trial on the merits. *See, O'Connor v. Ortega*, 480 U.S. 709, 731-32 (Justice Scalia, concurring).

D. Petitioners' Fourth Amendment Claim Need Not Have Been Brought as a Procedural Due Process Claim.

The fact that petitioners were deprived of their property without procedural due process, and the existence of potential state law remedies, does not affect the viability of their Fourth Amendment claim.

In *Zinermon v. Burch*, 494 U.S. 113 (1989), the Court reaffirmed that:

> overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983. A plaintiff, for example, may bring a §1983 action for an unlawful search and seizure despite the fact that the search or seizure violated the State's Constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion.

494 U.S. at 124-25. Violations of a specific protection of the Bill of Rights, or of the substantive component of the Fourteenth Amendment Due Process Clause, are actionable based on the violation itself regardless of whether state law provides remedies. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961); *Zinermon v. Burch*, 494 U.S. at 125. It is only for certain types of procedural due process claims that the existence of remedies under state law may be relevant in providing all the process a plaintiff is due, thus undermining the plaintiff's claim. *Zinermon v. Burch*, 494 U.S. at 125; *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1983).

Here, however, the panel and *en banc* majorities, asserting that they were "perplexed" that petitioners did not bring their case as a state law trespass claim, did use the existence of state law remedies as a bar to the Fourth Amendment claim. J.A. 38, 56-57, 68.[10] The Seventh Circuit majority held that petitioners were really bringing a procedural due process claim, and that *Graham v. Connor*, 490 U.S. 386 (1989), mandated that the "dominant character of the conduct challenged in a §1983 case determines the constitutional standard under which it is evaluated." J.A. 66. Thus, the court held, petitioners had to bring their claim as one for denial of procedural due process even though such a claim was not brought and would probably fail. This argument is illogical and completely misreads *Graham v. Connor*.

First, *Graham v. Connor* nowhere holds that a plaintiff who has suffered deprivations of a number of constitutional rights is limited to litigating under only one and has to accept the court's determination as to which is "most appropriate." *Graham* held only that §1983 excessive force claims are governed by the heightened Fourth Amendment standard of reasonableness rather than by the Fourteenth Amendment substantive due process standard, under which it would be more difficult for a plaintiff to prevail. This Court has on numerous occasions evaluated conduct under several different constitutional provisions with no suggestion that the possibility of success under one negates the others. *See, e.g., Zinermon v. Burch*, 494 U.S. at 126; *FW/PBS Inc. v. Dallas*, 493 U.S. 215

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[10] Trespass as a remedy for illegal search and seizure by police has been described as "completely impotent" because of the limitation of damages. Foote, Remedies for Police Violations, 39 Minn. L. Rev. 493, 498 (1955).

(1990) (discussing challenges to an ordinance under the Fourteenth and Fourth Amendments); *United States v. Sperry Corp.*, 493 U.S. 52 (government action challenged separately under the taking and due process clauses of the Fifth Amendment); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1971) (noting the possibility of a Fourth Amendment challenge in addition to one under the Fourteenth Amendment); *Hudson v. Palmer*, 468 U.S. 517 (1983) (discussing Fourth and Fourteenth Amendment claims); *Ingraham v. Wright*, 430 U.S. 651 (1977) (discussing Eighth and Fourteenth Amendment claims).

Second, *Graham* dealt with a situation where two different constitutional provisions arguably applied to the defendant's action. Here, however, procedural due process may not provide petitioners with a claim because state law did provide some process. *See, Parratt*, 451 U.S. at 544; *Hudson*, 468 U.S. at 535. Under the Seventh Circuit's reasoning, a plaintiff must sue under the constitutional provision that the Seventh Circuit believes comes closest to the plaintiff's claim, even though the claim lacks an essential ingredient that would require its dismissal.

Third, petitioners' claim was not for a denial of procedural due process. Petitioners had an absolute right, as against the whole world, to occupy their lot on September 4, 1987. The very earliest this right could have ended was September 22, 1987, and only then if Terrace Properties could sustain their burden of proving cause for dispossession of the Soldals, a burden they had previously

failed to carry.[11] Their claim was not that the seizure of their home was wrong because the right procedures were not used, their claim was that the seizure was unlawful regardless of the procedures used to effect it. No amount of procedure could legally terminate the Soldals' right to possession prior to September 22. Procedure was irrelevant to their dispossession on September 4; the dispossession itself was wrong.

The potential ramifications of the Seventh Circuit's opinion cannot have been thoroughly considered, and are extremely dangerous. Based upon a hypothetical possibility – the legal dispossession of the Soldals on September 22 after due process and a trial – the Seventh Circuit held that the Soldals had no claim for dispossession on September 4. This same reasoning would justify a police officer's decision to imprison a criminal defendant before trial, even when bail had been set, based on the officer's determination that the defendant would subsequently be found guilty and sentenced to prison; would justify a police officer's seizure of money from a criminal defendant in anticipation of the defendant being found guilty and fined; would authorize a police officer to anticipate a plaintiff's verdict in a personal injury case and seize assets of an insurance company; and would even sanction anticipatory execution of a prisoner on death row, or a death-eligible murder defendant, based on the executioner's belief, perhaps well-founded, that the death

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[11] The assertion in the original panel opinion, J.A. 35 and the suggestion in Judge Easterbrook's *en banc* concurrence, J.A. 70, that petitioners were behind in their rent is incorrect and has no basis in the record.

sentence would ultimately be carried out. The Seventh Circuit clearly would not sanction such results yet all are conceptually identical to the dispossession sanctioned in Soldal. In each case the result – imprisonment, fine, dispossession, death – could eventually happen, separated from the present only by procedural due process. Each could be analyzed as a procedural due process violation – the result was a possibility that could legally occur after process – yet surely each would be seen as violations of specific parts of the Bill of Rights such as the Fourth and Eighth Amendments.

Furthermore, the legal dispossession that the Seventh Circuit anticipated occurring on September 22, 1987 did not happen. The record demonstrates that, when the eviction proceeding came to trial, petitioners won and continued to live at Willoway until December 1987. The Seventh Circuit's presumption that their right to continued possession was doomed did not accord with the actual facts before the court.

The court of appeals' decision would also have the effect of eviscerating any claims for warrantless searches and seizures of persons or things based on probable cause. In such cases, the search or seizure would be legal if the correct process had been used; faced with a sufficient showing of probable cause, a magistrate would have issued a warrant. Yet, this Court has never allowed a Fourth Amendment violation to be excused by such a possibility. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Katz v. United States*, 389 U.S. 347, 358 (1967). In such a case, the constitutional violation is not a Fourteenth Amendment procedural due process claim for failure to

pursue legal process to obtain the warrant; rather, it is a direct violation of the Fourth Amendment.

The Seventh Circuit expressed concern that if petitioners were allowed to litigate their claim as a Fourth Amendment seizure "the elaborate jurisprudence of property deprivations under the due process clause that culminates in *Zinermon v. Burch* would turn out to be a point about pleading." 942 F.2d at 1077. This argument misapprehends the different nature of rights under the Fourth and Fourteenth Amendments.

The Fourteenth Amendment right to procedural due process protects against deprivations without constitutionally required pre- or post-deprivation process. *Zinermon v. Burch*, 494 U.S. 113, 127-128. The essence of the action is the denial of process in depriving a person of a constitutionally protected interest, not the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Indeed, a procedural due process violation is actionable "without regard to whether the same deprivation would have taken place even in the presence of proper procedural safeguards." *Zinermon v. Burch*, 494 U.S at 126 n. 11 (citing *Carey v. Piphus*, 435 U.S. at 266).

A Fourth Amendment violation, on the other hand, involves an unreasonable search or seizure, a determination that is not dependent on, though it may be affected by, the presence or absence of pre- or post-deprivation process. Thus, for example, a warrantless seizure of drugs in plain view is reasonable under the Fourth Amendment without any requirement of process – the obviously incriminating nature of the items makes their seizure reasonable. On the other hand, a seizure may be found

unreasonable even if it is effected after process has occurred. *See, e.g., Malley v. Briggs,* 475 U.S. 335, 345 (1985). Although process will often tend to establish that a seizure was reasonable, *see, e.g., Fuentes v. Shevin,* 407 U.S. 67, 96 n.32 (1972), this will not always be so. In a Fourth Amendment seizure it is the reasonableness of the taking itself, not the procedure, which is at issue.

Fourteenth Amendment procedural due process affects different interests than the Fourth Amendment. It applies to activities such as the provision of utility service, *Memphis Light Gas and Water Division v. Craft,* 436 U.S. 1 (1978), suspension of students from public school, *Goss v. Lopez,* 419 U.S. 565 (1975), forfeiture of a prisoner's good time, *Wolff v. McDonnell,* 418 U.S. 539 (1974), and termination of welfare benefits, *Goldberg v. Kelley,* 397 U.S. 254 (1970), that are unaffected by the Fourth Amendment protection of "houses, papers and effects" against unreasonable searches and seizures. In some cases both the Fourteenth and Fourth Amendments may apply, *see, e.g., Zinermon v. Burch,* 494 U.S. at 126, but there is nothing untoward about different constitutional provisions applying to the same conduct. *See supra,* at 39-40.

Holding that the Fourth Amendment applies to the intentional seizure of the petitioners' "house, papers, and effects" will not undo the *Parratt, Hudson,* and *Zinermon* Fourteenth Amendment jurisprudence. Where no specific violation of the Bill of Rights is involved, those cases will continue to control as to what process the state must provide when it deprives a person of life, liberty or property. Where there is a violation of a specific clause of the Bill of Rights, as there is here, then that violation is

not diminished by the fact that it also possesses some elements of a procedural due process claim.

The Seventh Circuit also expressed concern that allowing the petitioners' claim would swamp the federal courts with "garden-variety commercial disputes." J.A. 56. This concern is not well taken. This was hardly a garden-variety commercial dispute but rather a forcible dispossession by armed officers ready and willing to utilize the "awesome power of arrest and detention." *Moore v. Marketplace,* 754 F.2d 1336, 1346 (7th Cir. 1985). What began as a private dispute ascended to a wholly different level when the sheriff's officers entered the fray on the side of the lawbreakers, Terrace Properties and Margaret Hale. At that point, the acts of the private parties joined with the acts of the sheriffs, and were invested with the power and resources of the state. If the acts were unreasonable, they violated the Fourth Amendment.

This scenario is unlikely to occur on many occasions. Police officers and other state actors will customarily avoid involvement in private civil disputes and will generally seek the protection of a judicial writ prior to seizing non-criminal private property, except where there is an emergency. But if the officers do act unreasonably, and do insert themselves into private disputes, they should be prepared to find themselves liable for constitutional violations. Police officers are, by their station, authority and armed status, imbued with power denied to ordinary citizens. The Constitution commands that the power be exercised responsibly and, in the context of the Fourth Amendment, reasonably. If officers violate that command they should be liable in damages.

A person who has suffered a violation of a specific provision of the Bill of Rights is not barred from vindicating that right through an action under §1983 merely because the violation would appear to some to be a possible procedural due process violation. The Seventh Circuit's holding to the contrary is illogical, unsupported by any authority, and should be rejected.

E. Petitioners were Protected by the Fourth Amendment.

Underlying the Seventh Circuit's refusal to recognize the nature of the violation of the Soldals' rights appears to be a perception that they were entitled to less protection because they were tenants, and because their home was a trailer rather than a traditional fixed structure. J.A. 56-57, 68. This is bad law, and even worse social policy.

A person's status as tenant does not lessen his protection under the Fourth Amendment. *See, e.g., Chapman v. United States,* 365 U.S. 610 (1961). Even an overnight guest can have a legitimate expectation of privacy that the Fourth Amendment will protect. *Minnesota v. Olsen,* 495 U.S. 91 (1990). Although the Soldals' home was a trailer home of the type sometimes misleadingly called "mobile," such homes are "largely immobile as a practical matter. . . . They are generally placed permanently in parks; once in place, only about one in every hundred mobile homes is ever moved." *Yee v. City of Escondido,* ___ U.S. ___; 60 U.S.L.W. 4301 (April 1, 1992). Such homes are a far cry from the completely movable vehicles accorded diminished protection in *California v. Carney,* 471 U.S. 386

(1984), and the fact that the house was not a fixed structure should not limit petitioners' rights under the Fourth Amendment.

Nor does the fact that the Soldals' right to continued possession of their home rested in part on an entitlement under state law diminish the protection of the Fourth Amendment.[12] In many cases, a Fourth Amendment right rests in some respect on state law. For example, this Court has never shrunk from enforcing the Fourth Amendment's prohibition against arrest without probable cause merely because the arrest was for a claimed violation of state law. Yet state laws differ as to what conduct is criminal. In one state where possession of a type of gun is illegal a person can constitutionally be arrested for violation of that law, whereas in a state where possession of such a gun is legal, an arrest for possession would lack probable cause and be unconstitutional. Moreover, "legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 128, 143-44, n.12; *see also, Board of Regents v. Roth,* 408 U.S. 564 (1972). Thus, the fact that it was, in part, state law which entitled the Soldals to possess, and continue to possess, their home does not diminish but rather enhances their Fourth Amendment protections.

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[12] The Soldals right to possession also rested, in part, on their private contract with Terrace Properties to lease the lot in the park.

In summary, petitioners' possessory and privacy interests protected by the Fourth Amendment were violated when the sheriffs and private parties seized their home and its contents. These interests were not affected any less because petitioners were not suspected of criminal wrongdoing, nor because the seizure occurred in the course of the sheriffs' "civil" rather than "criminal" law enforcement. The decision of the Seventh Circuit holding that the Fourth Amendment does not govern the seizure of petitioners' home, papers, and effects, should be rejected and the case remanded to the district court for trial to determine whether the seizure was reasonable under Fourth Amendment standards.

II. THE SEIZURE, REMOVAL AND VIRTUAL DESTRUCTION OF PETITIONERS' HOUSE VIOLATED THEIR FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS

Petitioners alleged and presented proof that the sheriff's officers assisted the Willoway workers in destruction of portions of their trailer home, as well as its removal. Because such destruction violated petitioners' rights to substantive due process, the Seventh Circuit was incorrect in granting summary judgment on this issue as a matter of law.

The Due Process Clause of the Fourteenth Amendment applies to three different types of claims. First, it guarantees fair procedure, *i.e.* that the government will not deprive a person of "life, liberty or property" without

due process of law. Second, it incorporates specific protections of the Bill of Rights, such as the Fourth Amendment claim brought by petitioners here. Third, "the Due Process Clause contains a substantive component that bars certain arbitrary wrongful actions 'regardless of the fairness of the procedures used to implement them.' " *Zinermon v. Burch*, 494 U.S. 113, 125 (1989) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1985)). It was this last protection that petitioners sought to invoke when they alleged that the destruction of their property was a violation of their substantive due process rights. R.1, ¶ 31, 33.

Due process of law is described as a "constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' *Snyder v. Massachusetts*, 291 U.S. 97 (1933), or are 'implicit in the concept of ordered liberty' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." *Rochin v. California*, 342 U.S. 165, 169 (1951). Substantive due process protects against government action that "shocks the conscience," *id.* at 172, and "serves to prevent governmental power from being 'used for purposes of oppression.' " *Daniels v. Williams*, 474 U.S. 327, 331 (1985), (quoting *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 277 (1956)).

The complaint alleged that respondents engaged in "wanton destruction," inflicted as part of an "effort to intentionally damage the Soldals' trailer." J.A. 47 (Judge Flaum, dissenting). The facts as testified to by Mr. Soldal showed a level of destruction greatly in excess of anything that could be justified by a mere eviction. This was clearly conduct that was designed to intentionally hurt

petitioners and was not a necessary adjunct to an eviction. In addition, this destruction should not be viewed outside its context of a wholly illegal dispossession that was known to be illegal by the sheriffs at the scene. Moreover, this was not merely destruction of property; it was destruction of petitioners' home, a type of destruction likely to have immense repercussions on petitioners' ability to live their lives free from unwanted intrusion, and which would deeply affect their mental tranquility. The sheriff's aid to the destruction could be rationally seen as a use of power for the purpose of oppression that violated respect for petitioners' fundamental right to their home and shocked the conscience. Thus, a properly instructed jury could reasonably have entered judgment in favor of petitioners on their substantive due process claim. Summary judgment in favor of respondents was therefore in error and should be reversed.

CONCLUSION

The decision of the Seventh Circuit Court of Appeals should be reversed and the case remanded to the district court for a trial on the merits.

Respectfully submitted,

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